

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

IN RE:	§	
	§	
CRAWFORD E. DAVIS, II,	§	CASE NO. 99-60378-7
	§	
Debtor	§	
<hr/>		
RICK SCHKADE,	§	
	§	
Plaintiff	§	
	§	
vs.	§	ADVERSARY NO. 99-6027
	§	
CRAWFORD E. DAVIS, II,	§	
	§	
Defendant.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. The Debtor and Defendant, Crawford E. Davis II (Davis), is indebted to the Plaintiff, Rick Schkade (Schkade), in the approximate amount of \$200,000.00, arising from a series of loans made by Schkade to Davis. This lending arrangement originated in 1995. Davis is maker of a promissory note dated January 20, 1995, made payable to Schkade in the original principal amount of \$100,000.00, maturing January 20, 1996. A second note was signed by Davis, payable to Schkade, dated February 24, 1995, also in the amount of \$100,000.00, and due February 24, 1996. Notes identical to the two 1995 notes are signed in each of years 1996 and 1997, representing Davis's payment of the accrued interest and renewal of the principal owing on the prior year's note. All six notes contain the following provision: "In the event of default, Rick Schkade will be 1st lienholder of accounts receivable."

2. The loans were made for Davis's use in his used car business. Schkade testified that he originally agreed to make the loans because Davis's business was growing as evidenced by

substantial accounts receivable. Schkade also testified that he understood he would be paid first from Davis's collection of the receivables.

3. In 1995, Davis had a floor-plan financing with Crockett County Bank. Davis did not disclose the Crockett County Bank loan to Schkade. He also failed to disclose his financing with Richard Salmon.¹ In addition, from August, 1997, through December, 1997, Davis transferred funds from his car-lot account to a rental home account he maintained in connection with rental homes he owned and managed. The evidence indicates there was approximately \$48,000.00 transferred to such account.

4. Davis did not tell Clifford Bly that he (Davis) was indebted to Schkade because, if known, Bly would not have agreed to the work-out arrangement with Richard Salmon.

5. Over the period from 1995 to the time of his bankruptcy filing, Davis had, in addition to the loans already referenced, loans with the Small Business Administration, Clifford Bly, and David Gould. He also owed the Internal Revenue Service approximately \$134,000.00. Davis testified that he lost his rental properties, presumably from his failure to maintain payments on a loan secured by the rental properties.

6. If appropriate, these findings of fact shall be considered conclusions of law.

Conclusions of Law

7. This court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

This is a core proceeding. 28 U.S.C. § 157(b).

¹This adversary proceeding was jointly tried with the adversary proceeding *Richard Salmon v. Crawford E. Davis, II*, Adversary No. 99-6028. The findings of fact and conclusions of law in Adversary No. 99-6028 are attached hereto as Exhibit "A" and are incorporated herein as additional findings of fact and conclusions of law.

8. While Schkade has pled an objection to Davis receiving a discharge under § 727(a)(5) of the Bankruptcy Code (11 U.S.C.), this cause was not urged at trial. Such provision provides that the court shall grant the debtor a discharge unless the debtor has failed to explain satisfactorily any loss of assets or deficiency of assets to meet the debtor's liabilities. Schkade had the burden to prove his objection under § 727(a)(5). Rule 4005, Fed.R.Bankr.P. Schkade failed to prove any loss of assets or deficiency of assets. Schkade's claim under § 727(a)(5) is denied.

9. The pre-trial order recites that Schkade seeks to have his debt declared nondischargeable under § 523(a)(2) of the Bankruptcy Code, without specifying whether nondischargeability is sought under § 523(a)(2)(A) or (a)(2)(B). At trial, Schkade limited his cause of action to a claim under § 523(a)(2)(A).

10. Section 523(a)(2)(A) of the Bankruptcy Code provides that a discharge under § 727 does not discharge an individual debtor from any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. 11 U.S.C. § 523(a)(2)(A).

11. A creditor must prove its claim of nondischargeability by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 286, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991); *AT&T Universal Card Servs. v. Mercer (In re Mercer)*, 211 F.3d 214, 216-17 (5th Cir. 2000); *RecoverEdge, L.P. v. Pentecost*, 44 F.3d 1284, 1292 (5th Cir. 1995).

12. For a debtor's representation to be a false representation or pretense, a creditor must show that the debtor: (1) made a knowing and fraudulent falsehood; (2) describing past or current

facts; (3) that was relied upon by the creditor; (4) who thereby suffered a loss. *In re Mercer*, at 216-17; *RecoverEdge* at 1292-93.

13. To prove nondischargeability under an actual fraud theory, the objecting creditor must prove that: (1) the debtor made representations; (2) at the time they were made the debtor knew they were false; (3) the debtor made the representations with the intention and purpose to deceive the creditor; (4) the creditor relied upon such representations; and (5) the creditor sustained losses as a proximate result of the representations. *RecoverEdge* at 1292. The creditor must show that it actually and justifiably relied on the debtor's representations. *Field v. Mans*, 516 U.S. 59, 69-70, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995).

14. Under either theory, false pretenses/representation, or actual fraud, Schkade must establish, as a threshold element, that Davis made a representation.

15. The six promissory notes signed by Davis and made payable to Schkade each provide that, in the event of default, Schkade will be first lienholder on the accounts receivable. While the evidence establishes that Davis had other loans, including a loan from the Crockett National Bank and Richard Salmon, both of which apparently originated in 1995, there is no evidence that the representation that Schkade would be, upon default, first lienholder against accounts receivables was false when made. It is inherently ambiguous to declare that a creditor "will be" first lienholder.

16. Davis's representation that Schkade will be first lienholder is not a representation describing past or current facts.

17. The ambiguous nature of the representation made by Davis dictates that any reliance by Schkade is not justifiable.

18. Under the circumstances, Schkade has failed to prove Davis made representations sufficient to justify a finding of false pretenses, a false representation, or actual fraud.

19. Schkade's claim under § 523(a)(2) is denied.

20. If appropriate, these conclusions of law shall be findings of fact.

Signed October ____, 2000.

Robert L. Jones
UNITED STATES BANKRUPTCY JUDGE